Eagaivallinayagi Ammal v Chin Min Hua & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–2615–10 OF 2011
ABDUL WAHAB PATAIL, LINTON ALBERT AND HAMID SULTAN JJCA
29 JANUARY 2015

Contract — Specific performance — Non-payment of balance purchase price — Purchaser only paid 10% of purchase price and did not pay balance at all — Purchaser granted specific performance of sale and purchase agreement in High Court — Whether High Court erred when no mention of non-payment of balance purchase price made in statement of claim — Specific Relief Act 1950

This was an appeal by the appellant ('the defendant') against the decision of the judicial commissioner allowing an order for specific performance by the purchasers ('the plaintiffs') who had only paid 10% of the purchase price and had not paid the balance purchase price at all and who was granted specific performance with no mention in the order relating to balance purchase price. The defendant's claim arose via sales and purchase agreement ('the SPA') entered where only 10% was paid by the plaintiffs to the vendor. Another RM20,000 was agreed to be paid to the vendor to vacate the squatters. The vendor did not ask for the RM20,000 and neither did the plaintiffs pay the balance purchase price to the vendor within 90 days time frame in the SPA. Without payment of balance purchase price and/or seeking assistance of the court from the year 1996 for whatever breach the purchaser complained of against the vendor, the purported plaintiffs claimed for specific performance with no mention in the prayer in the statement of claim for the payment of balance purchase price.

Held, allowing the appeal with costs of RM10,000; remitting the case back to the High Court:

(1) Without payment of balance purchase price and/or securing the balance purchase price for the benefit of the vendor in the order for specific performance will be bad in law. The principle is one relating to common sense and well entrenched under the Specific Relief Act 1950 and related case laws. The complaint by the defendant was on an issue of law. The court had no option but to set aside the order and direct that the plaintiffs' action be heard before another judge (see para 2).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan') terhadap keputusan pesuruhjaya kehakiman membenarkan perintah untuk pelaksanaan spesifik oleh pembeli-pembeli ('plaintif-plaintif') yang hanya membayar 10% daripada harga belian dan langsung tidak membayar baki harga belian dan yang memberikan pelaksanaan spesifik tanpa sebutan dalam perintah berkaitan baki harga belian. Tuntutan defendan berbangkit melalui perjanjian jual beli ('PJB') yang dimasuki yang mana hanya 10% dibayar oleh plaintif-plaintif kepada penjual. Sebanyak RM20,000 lagi dipersetujui dibayar kepada penjual untuk menghalau setinggan-setinggan. Penjual tidak meminta wang sebanyak RM20,000 dan plaintif-plaintif juga tidak membayar baki harga belian kepada penjual dalam jangka masa 90 hari PJB. Tanpa bayaran baki harga belian dan/atau memohon bantuan mahkamah dari tahun 1996 untuk apa-apa kemungkiran yang diadukan oleh pembeli terhadap penjual, plaintif-plaintif tersebut menuntut untuk perlaksanaan spesifik tanpa sebutan dalam permohonan di dalam pernyataan tuntutan untuk bayaran baki harga belian.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000; meremit semula kes kepada Mahkamah Tinggi:

(1) Tanpa bayaran baki harga belian dan/atau menjamin baki harga belian untuk faedah penjual dalam perintah pelaksanaan spesifik adalah tidak elok dari segi undang-undang. Prinsip adalah satu yang berkaitan akal budi dan kukuh di bawah Akta Relief Spesifik 1950 dan kes undang-undang yang berkaitan. Aduan oleh defendan adalah atas isu undang-undang. Mahkamah tidak mempunyai pilihan tetapi untuk mengetepikan perintah dan mengarah tindakan plaintif didengar di hadapan hakim yang lain (lihat perenggan 2).]

Cases referred to

Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd [2012] MLJU 795; [2012] 1 LNS 994, HC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (Consd)

Legislation referred to

Specific Relief Act 1950

Appeal from: Civil Suit No 22–760 of 2009 (High Court, Pulau Pinang)

Darshan Singh Gill (Darshan, Syed, Amarjit & Partners) for the appellant.
Vincent Tey Wei Seng (Jublin Tan & Tey) for the respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's/defendant's appeal was against the decision of the learned judicial commissioner allowing an order for specific performance by a purported purchaser who had only paid 10% of the purchase price and has not paid the balance purchase price at all and who was granted specific performance with no mention in the order relating to balance purchase price came up for hearing on 12 May 2014. Upon hearing, we set aside the order and directed the matter to be heard before another judge for proper determination of issues, and thanked learned counsel for their able submission. My learned brothers Abdul Wahab bin Patail JCA and Linton Albert JCA have read the draft judgment and approved the same. This is our judgment.

JURISPRUDENCE

[2] It is trite without payment of balance purchase price and/or securing the balance purchase price for the benefit of the vendor in the order for specific performance will be bad in law. The principle is one relating to common sense and well entrenched under the Specific Relief Act 1950 and related case laws. The learned judicial commissioner has failed to apply the common sense principle as advocated by the Privy Council in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 relating to purchase of property and is reflected on the face of the judgment and in our considered view, upon the complaint by learned counsel for the appellant on a issue of law, we had no option but to set aside the order and direct that the plaintiffs' action be heard before another judge.

BRIEF FACTS

[3] The case has chequered history. In essence, the plaintiffs' claim arises via sales and purchase agreement entered into on 23 May 1996. Only 10% was paid by the purchaser to the vendor. Another RM20,000 was agreed to be paid to the vendor to vacate the squatters. The vendor did not ask for the RM20,000 neither the purchaser paid the balance purchase price to the vendor within 90 days time frame in the sale and purchase agreement. Without payment of balance purchase price and/or seeking assistance of the court from the year 1996 for whatever breach the purchaser complains of against the vendor, the purported purchaser ('the plaintiff') claimed for specific performance with no mention in the prayer in the statement of claim for the payment of balance purchase price. The prayer in para 19 of the statement of claim reads as follows:

> 19 Oleh yang demikian, plaintif-plaintif memohon perintah-perintah seperti yang berikut:
>
> (a) Suatu Perlaksanaan Spesific Perjanjian tersebut;

(b) Suatu Perintah bahawa defendan menyerahkan kepada plaintif-plaintif Borang Pindah Milik yang telah ditandatangani oleh defendan;

(c) Mahkamah Terhormat ini memberi satu Perintah bahawa dalam tempoh 14 hari dari tarikh Penghakiman, defendan mengambil tindakan sewajarnya untuk mengeluarkan setinggan-setinggan di atas tanah tersebut;

(d) Suatu Perintah bahawa defendan memberi milikan kosong 30 hari dari tarikh penghakiman;

(e) Gantirugi am untuk ditaksirkan;

(f) Bahawa kos bagi permohonan ini ditanggung oleh defendan; dan

(g) Lain-lain perintah yang difikirkan patut dan suaimanfaat oleh Mahkamah Yang Mulia ini.

[4] The learned judicial commissioner's conclusion in the judgment reads as follows:

From the evidence as a whole and for the reasons as deliberated above, I hold that the plaintiffs have proved their case against the defendant on a balance of probabilities and the plaintiffs' claim is therefore allowed as in para 19 of the statement of claim in respect of prayer (a), (b), (c) and for prayer (d), the defendant is ordered to deliver vacant possession of the said land within two months from the date of this judgment. Costs of RM7,000 is awarded to the plaintiffs. Since no evidence had been led by the plaintiffs as to any damages suffered, the question of assessment of damages does not arise; prayer (e) is therefore allowed.

The defendant's counterclaim is dismissed with no additional costs.

[5] It must be noted that prayer (c) and (d) which is mandatory in nature, relating to squatters and/or vacant possession is not one which can ordinarily be done within the stipulated time frame and will stand as an irrational order on the facts of the case.

[6] The facts of the case is well articulated by the learned judicial commissioner and much judicial time will be saved if it is repeated to appreciate the factual matrix of the case. The brief facts read as follows:

Plaintiffs are male siblings and the legal beneficiaries as well as executors of the estate of their late father Chin Teik Yoon @ Chin Tit Boon, the deceased purchaser. Defendant is the holder of power of attorney of Selvarajah a/l Ratnam, the deceased vendor, who was registered owner of land held under Geran Mukim No 323, Lot 725, Mukim 5, Daerah Seberang Perai Selatan, Pulau Pinang (hereinafter referred to as 'the said land').

Vide a Sale and Purchase Agreement dated 23.5.1996 ('the said agreement') entered into between the deceased purchaser and the defendant as attorney of the deceased vendor, defendant agreed to sell the said land to the deceased purchaser at the price of RM213,673.60 free from all encumbrances and with vacant possession. Upon

signing the said Agreement, deceased purchaser had paid a depot sum of RM21,367.36 of which the defendant had acknowledged receipt.

It was provided in the said Agreement that the vendor shall sign a Memorandum of Transfer in favour the deceased purchaser or his nominee and shall hand over the same to the solicitors acting for the deceased purchaser at the material time, ie Messrs A Rajadurai & Co. Defendant at the material time was represented by her solicitors Messrs Hassan & JJ Naidu.

The balance payments as agreed by the parties were that RM20,000.00 was to be paid by the deceased purchaser upon request by the solicitors for the vendor and this sum was to be held by the vendor's solicitors as stakeholder for payment to the two known squatters for them to vacate their premises on the said land. The remaining RM172,306.24 was to be paid within 90 days from the date of the said Agreement or within the extended 60 days. Vacant possession was to be delivered by the vendor to the deceased purchaser upon full payment.

However, Memorandum of Transfer in favour of the deceased purchaser was not handed to Messrs A Rajadurai & Co despite repeated requests. Defendant's solicitors at the material time had also failed to make any request for the payment of the RM20,000.00 in accordance with the term and condition of the said Agreement to pay as compensation to the two squatters for vacating the premises on the said land. According to plaintiffs, the squatters are still occupying the said land. Plaintiff did not pay the balance of sum of RM172,306.24 in accordance with the 90 days time frame on grounds that defendant had failed to comply with the condition of the said Agreement to hand over the Memorandum of Transfer through her solicitors to the deceased purchaser's solicitors and there was no request made by the defendant's then solicitors for the 2nd payment of RM20,000.00 which should precede the final payment of RM172,306.24. Plaintiffs asserted that they are able and willing to pay the unpaid sums in the said Agreement within 14 days if the defendant is able to remove the squatters and to request for the said payments. Therefore, plaintiffs prayed inter alia for specific performance of the said Agreement, an order that defendant is to take action to evict the squatters and to deliver vacant possession of the said land to the plaintiffs, general damages to be assessed and costs.

Defendant's contention in defence is that vacant possession of the said land could only be delivered after full purchase price had been paid. On the failure of the defendant's solicitors to forward the Memorandum of Transfer to the deceased purchaser's solicitors, defendant contended that it was the negligence of the purchaser's solicitors and put the plaintiffs to strict proof of any repeated requests. Defendant contended further that plaintiffs' action is time barred. Finally, in the prayers, defendant counterclaimed for the caveat lodged by the plaintiffs to be withdrawn by the plaintiffs, general damages and costs.

[7] We have perused the 16 page judgment, in great detail. To the credit of the learned judicial commissioner it is well drafted in English and a speaking judgment save that the judgment does not demonstrate jurisprudence relating to specific performance at all, and the judgment is perverse. The judgment in our view did not pass the acid test of reasonableness (see *Damusa Sdn Bhd v*

MRCB Prasarana Sdn Bhd [2012] MLJU 795; [2012] 1 LNS 994). In consequence, the judgment dated 19 September 2011 is set aside and the case is remitted to the High Court to be heard before another judge afresh and the respondent to pay costs of RM10,000 to the appellant and the deposit to be refunded to the appellant.

[8] We hereby ordered so.

Appeal allowed with costs of RM10,000; case remitted back to the High Court.

Reported by Afiq Mohamad Noor